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In The Supreme Court of the United States

STATE OF TEXAS, *ET AL.*,
Petitioners,

v.

CHERYL J. HOPWOOD, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Court should grant the petition. Respondents Elliot and Rogers join in petitioners' request that the Court grant certiorari, agreeing that the issues are of national significance and that the Court's long silence on the consideration of race in higher education has left conflict and confusion in the lower courts. *See* Elliot/Rogers Br. 1. Respondents Hopwood and Carvell, too, do not dispute the national significance of the issues presented or many of the divisions in the courts discussed in the petition. *See* Hopwood/Carvell Br. 2. For the most part, they devote themselves to defending the court of appeals's decision, without successfully explaining why the Court should not address these important issues. As the case presents issues of admitted national significance on which the lower courts are divided, this Court should decide them.

ARGUMENT

I. THE JUDGMENT BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OF OTHER CIRCUITS.

A. The Conflict with *Bakke*. Respondents Hopwood and Carvell agree that *Bakke*'s holding was that

> "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of the Court per Powell, J.).

Although respondents recognize that in *Bakke* the Court held that it was improper to prohibit any consideration of race in admissions, they nevertheless insist that the Fifth Circuit's substantively identical judicial instruction somehow escapes *Bakke*. They claim that the court of appeals followed *Bakke*'s holding and ignored only its "rationales." Hopwood/Carvell Br. 13. But the court of appeals's refusal to follow *either* rationale in *Bakke* was necessarily a refusal to follow its holding. Unless *Bakke* is repudiated, one or the other of its rationales, or the two combined, justifies some limited consideration of race.

Respondents also contend that the Fifth Circuit's judicial instruction is consistent with *Bakke* because it rejects only four possible justifications for consideration of race in admissions. *Id.*, at 14. They improperly claim that the court of appeals "did not foreclose the use of race in all conceivable situations" and that "if the law school had itself engaged in past discrimination, the effects of which were presently being felt," the court would permit the law school to remedy those effects. *Id.* This saccharine description of the court of appeals's ruling does not cohere with reality. The

prohibited justifications comprised all the reasons why the law school might ever consider race in admissions and were plainly so understood in both *Hopwood II* and *Hopwood III*. There was no practical difference between the court of appeals's "judicial instruction" and the injunction barring any consideration of race.

Respondents also defend the Fifth Circuit by pointing to its acknowledgment in *Hopwood III* that the district court's injunction was so broad that it conflicted with *Bakke*. *Id.* That recognition, however, is irreconcilable with the core holding that the law school may not consider race for any of the four specified reasons. Moreover, it only highlights the disconnect between *Bakke* and the Fifth Circuit's decision and does not salvage the court of appeals's holding or represent an allegiance to *Bakke*.

Despite being presented with the law school's admissions policy, Pet. 23 n.3, respondents suggest that the law school aims to achieve only racial diversity and is at odds with Justice Powell's vision of multiple forms of diversity. Hopwood/Carvell Br. 16. The admissions policy makes clear that the law school values many sources of diversity, but because only racial diversity is systematically eliminated by the ordinary workings of the admissions process, race-conscious admissions policies have been utilized. *See* Br. *Amici Curiae* Ass'n of Am. Law Schools, *et al.* 2 (most AALS law schools have a race-conscious admissions program).

It cannot be realistically disputed that the Fifth Circuit has put the status of *Bakke* in controversy. *Only* this Court can tell the lower courts, the States, and educational institutions the status and meaning of *Bakke*.

B. The Conflict in the Lower Courts over Diversity. Respondents do not dispute that there is sharp disagreement in the lower courts over educational diversity as a compelling state interest. Hopwood/Carvell Br. 15. Both the Fifth and Ninth

Circuits have expressly recognized their conflict. Pet. 11. And two district courts within one district in Michigan have considered the same institution and reached directly opposite conclusions on the issue within a matter of months. Pet. 21. Courts are also in disagreement with the Fifth Circuit's holding that consideration of race is limited to remedial interests. *See* Pet. 11. Unable to deny the conflicts, Hopwood and Carvell try only to minimize them, emphasizing that many courts have decided cases on other grounds to avoid confronting the confused body of law on compelling interest. But abandoning the law on proper compelling interests only worsens the effect of the divisions by fixing conflict as the only reference point for States looking for guidance.

C. The Conflict over Remedying Past Discrimination and Preventing Racial Identifiability. Respondents do not deny the States' interest in remedying past discrimination. Instead they try to package the various effects of past discrimination presented by the law school as amorphous, untraceable "societal discrimination," which is not a valid justification for racial classifications. Hopwood/Carvell Br. i, 18-20. But, contrary to respondents' characterization, discrimination in Texas public education was *governmental* discrimination, and was not in the distant past, as they suggest. *See id.*, at 2, 20. Respondents are also simply wrong in their effort to relegate the facts on this issue to the broad category of "societal discrimination." Many Texas school districts had not reached unitary status when this case was tried in 1994. *Hopwood A*, 861 F.Supp. 551, 554 (W.D. Tex. 1994). In addition, respondents misrepresent the district court's findings in claiming that Mexican-American students never suffered *de jure* discrimination. *See id.*, at 554-55.[1]

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1. "Many of the school districts found to be operating dual systems of education were also found to practice official discrimination against black and Mexican American students." *Hopwood A*, 861 F.Supp., at 554. At the university itself, long after the *Sweatt* case, "Mexican American students were

Respondents ignore the real effects of past discrimination in denying a conflict with *United States v. Fordice*, 505 U.S. 717 (1992). The Fifth Circuit's holding that the State is confined to race-neutral admissions policies in its efforts to remedy the present effects of past discrimination and prevent *de facto* resegregation of the law school is at odds with *Fordice*. *See id.*, at 729. In addition, *Fordice* supports the systemic assessment of past discrimination, an approach refused by the court of appeals. *See id.*, at 727-28. Entrenched in an artificially segmented view of the source of past discrimination in Texas education, respondents offer on this point only repetitions of the Fifth Circuit's labeling of the evidence of past discrimination as "societal discrimination" and "historical fact." Hopwood/Carvell Br. 19. The facts of past discrimination are not, as respondents would have it, irrelevant. Ending racial identifiability at the law school remediates the racial identifiability of the applicant pool, which has resulted from the law school's and the university's past discrimination, as well as governmental discrimination elsewhere in Texas public education, and in turn, cures other continuing effects of past discrimination, especially minority communities' mistrust of the law school and the law school's status as a hostile environment for minority students.

Respondents do not dispute that the lower court decision squarely conflicts with *Geier v. Alexander*, 801 F.2d 799 (CA6 1996), in which the Sixth Circuit upheld consideration of race in law school admissions based on the continuing effects of earlier discrimination in the state's educational system. They attempt to temper the conflict with *Brewer v. West Irondequoit Central School District*, 212 F.3d 738, 745-46, 752-53 (CA2 2000), asking that *Brewer* be confined to its facts. *See* Hopwood/Carvell Br. 21 n.18. But the critical fact of that case, which held that the elimination of

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segregated in on-campus housing and assigned to a dormitory known as 'the barracks,' as well as excluded from membership in most university-sponsored organizations." *Id.*, at 555.

de facto segregation is a compelling interest, is the student body's racial identifiability. The only difference between the two cases sharpens the conflict—in *Brewer*, the racial identifiability was not linked to past discrimination.

II. THIS CASE PRESENTS CONSTITUTIONAL ISSUES OF GREAT NATIONAL IMPORTANCE.

All respondents agree that this case presents issues of serious and national significance. *Id.*, at 2; Elliott/Rogers Br. 1. The briefs of *amici curiae* confirm the importance of the issues for the nation's law schools and for institutions of higher education across America. *See* Br. *Amici Curiae* Texas Law School Deans; Br. *Amici Curiae* Ass'n of Am. Law Schools, *et al.* The proper role of race in admissions has obvious importance to both public and private colleges and universities around the country, and continued inconsistency in the courts is intolerable.

Nor do respondents dispute the significance of this case to states with formerly *de jure* segregated systems of higher education. Because these states operate under a variety of judicial decrees and desegregation plans, all designed to eliminate racially identifiable institutions of higher education, *see Hopwood A*, 861 F.Supp., at 555-56, questions about the relationship of race-conscious decision-making and desegregation efforts continue to be of critical significance in such states.

This case is also of great importance to the maintenance of selective admissions standards. Since the petition was filed, the Texas Legislature has enacted another well-intentioned law, now awaiting the Governor's signature, prohibiting professional and graduate schools from using a standardized test as the "sole criterion" or as "the primary criterion to end consideration of [an] applicant." Act of May 27, 2001, 77th Leg., R.S., H.B. 1641, §1; *see also* Pet. 19-20. These approaches inevitably erode the interest in academic excellence by reducing standards across the board for

all applicants, rather than for a small number of select applicants. Contrary to respondents' assertion, such legislation heightens the need for review because it would be far better for the quality of academic institutions to retain their ability to consider race among a variety of admissions criteria, together with standardized measures of academic merit, than to be forbidden them all.[2] Any method of avoiding resegregation that is not cognizant of race will inevitably affect considerably more seats in a class than a carefully designed race-conscious admissions policy.

III. This Case Squarely Presents Important Issues Not Squarely Presented by Other Cases.

Only this case squarely presents the issue of educational diversity and the equally important issue of whether remedying the effects of past discrimination is a compelling interest in the context of admissions to higher education. The Court denied certiorari in *Smith v. University of Washington*, 69 U.S.L.W. 3593 (U.S. May 29, 2001) (No. 00-1341). Respondents claim that the two University of Michigan cases present past discrimination issues. Hopwood/Carvell Br. 22. But only intervenors, not the university, have defended on the ground of remedying past discrimination in those cases, and the intervenors argue only societal discrimination. Pet. 21-22 & n.21. And with Michigan not having Texas's history of *de jure* segregation, this case remains a unique presentation of both the compelling interest questions of educational diversity and past discrimination.

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2. Respondents suggest that such statutes are an extra-record matter requiring factual assessment. Hopwood/Carvell Br. 12 nn.10-11. The statutes are public record, and their restriction of meritocratic admissions criteria appears on their face.

IV. THE COURT OF APPEALS'S JUDICIAL INSTRUCTION SHOULD NOW BE REVIEWED.

Petitioners seek review of the court of appeals's judicial instruction that prohibits the law school from using race in any fashion in admissions decisions. Respondents recognize that this instruction is binding on the law school and, as such, is reviewable by the Court. *See* Hopwood/Carvell Br. 26 n.21 ("respondents here achieved 'forward-looking' relief from the court of appeals in 1996 inasmuch as the *Hopwood II* opinion has compelled the law school to adhere to a race-neutral admissions policy"); *see also id.*, at 10, 25, 28. It is this forward-looking relief that petitioners ask the Court to review.

Although respondents emphatically agree that "the law school is bound by the *Hopwood II* decision," *id.*, at 26, that "form is not dispositive," and that an order "with all the practical consequences of an injunction" will support jurisdiction, *id.*, at 11 n.9 (quoting Pet. 26), they claim that a decision by the Court in this case would be "an advisory opinion," *id.*, at 1, 23.

Petitioners do not seek an advisory opinion. Petitioners seek review of a judicial instruction that remains in place as "'a clear directive from the federal courts,' that was 'stated, three times with all the precision of an injunction or a declaratory judgment.'" *Id.*, at 10 (quoting Pet. 22, 24). Because that prohibition is in place, and because the law school has made clear its desire to resume consideration of race in some limited form in admissions decisions, *see* Pet. 23, the case continues to be animated by a live issue. For respondents, the only way petitioners could create a cognizable controversy is to openly defy the Fifth Circuit, a scenario difficult to imagine and hardly appropriate to encourage in order to invigorate the "liveness" of a controversy. It is sufficient that "the law school is bound" by the Fifth Circuit's instruction, Hopwood/Carvell Br. 26, and that it would resume consideration of race if the judicial instruction were lifted. This commitment by the

law school is in direct contrast to the University of Washington case, in which the State of Washington abandoned its admissions policy by state law. *See Smith*, 69 U.S.L.W. 3593 (denying certiorari).

Respondents bottom much of their opposition on their contention that there is no contested admissions policy in the case. Hopwood/Carvell Br. 24. But it is only the Fifth Circuit's judicial instruction that prevents the existence of a specific policy. Just as citizens need not risk arrest and prosecution to obtain a ruling on a claimed constitutional right, *e.g.*, *Steffel v. Thompson*, 415 U.S. 452, 459 (1974), the law school need not defy the Fifth Circuit to have its decision reviewed. In any event, the details of a particular admissions program would be necessary only if the petition presented an issue of least restrictive means.[3] But this case concerns compelling interest issues, and the Fifth Circuit has prohibited any use of race, no matter the means or details of implementation.[4]

Even as they claim the decision is not reviewable by the Court, respondents inconsistently assert that the Fifth Circuit's decision was fully reviewable in 1996 and that nothing has changed. *E.g.*, Hopwood/Carvell Br. 25 n.20. While implicitly acknowledging the continued reviewability of the Fifth Circuit's judicial instruction,

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3. Respondents interject an outside issue by claiming that the petition should be denied because the admissions program should fail the second aspect of the constitutional analysis, the narrowly tailored requirement. *See* Hopwood/Carvell Br. 23-24 n.19. That issue, however, is not presented by the petition nor was it decided by the Fifth Circuit.

4. The law school's desired policy is no mystery. The existing admissions policy is set out in the petition, Pet. 23 n.3, making clear that many factors will be considered along with race. Because of its strong commitment to academic excellence, the law school will implement the smallest possible racial preference consistent with reasonable diversity. The district court found that the law school has consistently reduced its degree of racial preference. *See* Pet. 5.

they assert that the previous denial of certiorari somehow commands a denial of this petition. But that is not the law, nor is it consistent with the Court's practice. *See* Pet. 23. Timing and questions for review are discretionary, and the Court has of course long preferred to review judgments after they reach the end of their road.

That *Hopwood II*'s "judicial instruction" serves as either an injunction or declaratory judgment, and is properly reviewable, is confirmed by *Hopwood III*'s award of attorneys' fees. Pet. 25-26. If the 1996 judicial instruction supports the fee award, it is indeed an appealable order. Respondents do not and cannot deny that the size of their fee award is predicated on the judicial instruction that petitioners ask the Court to review.

Respondents misread petitioners' point about their inappropriate attempts to insulate this case from review. Hopwood and Carvell claim that an injunction was irrelevant because they obtained a *de facto* injunction in *Hopwood II*. Hopwood/Carvell Br. 25-26. Rogers and Elliott assert that they do continue to seek an injunction. Elliott/Rogers Br. 1-2.[5] The critical principle, which none address, is that petitioners should not be bound by a judgment that is argued to have become unreviewable through no fault of their own. *See* Pet. 28-29.

CONCLUSION

The petition should be granted. Alternatively, the award of attorneys' fees should be summarily reversed and the court of appeals's "judicial instruction" should be vacated and remanded with instructions to dismiss or to enter a properly appealable judgment.

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5. This position is at odds with all four respondents' recent disavowal of a desire for injunctive relief in the district court. *See* Tr., pp. 4-5, Status Conference (W.D. Tex. Feb. 15, 2001) (copy of transcript has been lodged with the Court).

Respectfully submitted,

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